CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 83

NORMAN W. BINGHAM, JR., ET AL., ETC.,
PETITIONERS

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 83

NORMAN W. BINGHAM, JR., ET AL., ETC.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1934.

No. 2983.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLANT,

v.

NORMAN W. BINGHAM, JR., ET AL., EXECUTORS,

PETITIONERS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 4592, LAW DOCKET.

NORMAN W. BINGHAM, JR., ET AL.,
EXECUTORS OF THE WILL OF KING U. [illegible],

PETITIONERS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

The petition in this cause was filed in the clerk's office on the tenth day of January, A. D. 1931, and was duly entered at the December Term of this court, A. D. 1930, and is as follows:

PETITION OF NORMAN W. BINGHAM, JR., ET AL., EXECUTORS OF THE WILL OF KING UPTON.

[Filed January 10, 1931.]

The petitioners say:

FIRST: That they are the executors of the will of King Upton, late of Marblehead, in the District of Massachusetts.

SECOND: That on or about February 24, 1922, return for Federal Estate tax was filed by the said executors with the Office of Collector of Internal Revenue at Boston, said return being made up by said Executors in accordance with the provisions of the Revenue Act of 1918 and regulations pertaining thereto then in force; that the amount of Federal estate tax shown due by said return was $8415.43; and that said tax was paid at the time of filing the return, to the then Collector, Malcolm E. Nichols, who, as your petitioners are informed and believe and therefore say, in turn turned it over to the United States.

THIRD: That in compliance with the Regulations of the Commissioner of Internal Revenue there was included in said estate tax return the proceeds of all policies of insurance taken out by the decedent upon his own life, whether payable to his estate or to any other beneficiaries; that the proceeds of the policies amounted to $88,284.96 and that all of said policies at the time of the death of the decedent were payable to beneficiaries other than his estate or its representatives; that the tax paid on February 24, 1922, included a tax upon $48,284.96, to wit, the excess over $40,000. of the full amount of said policies.

FOURTH: Included among the said policies were the following:

(a) Four policies of the Berkshire Life Insurance Company for $5,000. each, issued one in 1891, one in 1893, and two in 1895, payable upon the death of the assured to his executors, administrators or assigns. These policies contained no reservation of the right to change the beneficiary. On July 25, 1904 the decedent assigned all his right, title and interest in

said policies to his wife, Annie D. Upton, provided she survived him, reserving and excepting only the right to the assured to apply the cash value of any dividends or additions thereon in payment of premiums thereafter due on said policy. This assignment was subject only to a prior assignment to the Berkshire Life Insurance Company as security for a loan. Said Annie D. Upton survived the decedent and received the net proceeds of these policies in excess of the loan, to wit: the sum of $14,334.49, as set forth in the return.

(b) Two policies for $5,000. each in the Manhattan Life Insurance Company, issued in 1888, one payable upon the death of the assured to George Upton and the other to Annie D. Upton. There was no reservation in either of these policies of any right in the assured to change the beneficiary. Said George Upton and Annie D. Upton survived the decedent and received the net proceeds of these policies, to wit; the sum of $5,000. each, as set forth in the return.

(c) A policy for $10,000. in the National Life Insurance Company, Montpelier, Vt., issued in 1892, payable upon the death of the assured to his legal representatives or assigns. The following endorsement was made on the policy:

> "Beneficiary changed July 28th, 1904, at request of the insured to his wife Annie D. Upton if living, at his decease, otherwise the executors, administrators or assigns of the insured, or to such other beneficiaries as may, from time to time, be designated by the insured by written request filed with the Company during his lifetime, such changes to take effect only when endorsed on the policy by the Company."

Said Annie D. Upton survived the decedent and received the net proceeds of the policy, to wit; the sum of $10,072.51 as set forth in the return.

(d) A policy for $10,000. in the Fidelity Mutual Life Insurance Company of Philadelphia, Penna., issued in 1908, payable upon the death of the assured to Annie D. Upton.

A right was reserved to the assured to change the beneficiary but was never exercised. Said Annie D. Upton survived the decedent and received the net proceeds of the policy, to wit: the sum of $10,000. as set forth in the return.

(e) A policy for $5,000. in the Connecticut Mutual Life Insurance Co. issued in 1883, payable upon the death of the assured to Annie D. Upton. There was no reservation to the insured of the right to change the beneficiary of this policy. Said Annie D. Upton survived the decedent and received the net proceeds of the policy, to wit: the sum of $5,035.37, as set forth in the return.

FIFTH: That the proceeds of the policies named in the subdivisions to the preceding paragraphs were erroneously included as part of the gross estate of the decedent, and the tax paid by the decedent, to the extent that it was based on the proceeds of said policies, to wit: to the extent of $1931.39, was without warrant in law and was illegal and void.

SIXTH: That thereafter on or about May 28, 1925, your petitioners duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a claim for refund of said tax in the amount of $1931.39, and on August 10, 1925, filed with said Collector an amended claim for refund, both said claims for refund being based on the illegal imposition of a tax on said policies of insurance.

SEVENTH: That thereafter, on the 28th day of March, 1930, the Commissioner of Internal Revenue rejected said claims for refund in their entirety.

EIGHTH: That your petitioners are advised and therefore aver that the collection from them of the said sum of $1931.39 as a tax alleged to be due under Title IV of the Revenue Act of 1918 on the proceeds of the above mentioned insurance policies was illegal, erroneous and unlawful in that said policies of insurance were taken out, and were made payable to beneficiaries other than the decedent's estate, long prior to the passage of the Revenue Act of 1918, the policies referred to in subparagraphs (a) (b) (e) and, it is claimed,

(c) of Paragraph Fourth not being subject to change in beneficiary by the decedent, and the policies referred to in subparagraphs (c) and (d) not having had any change made by the decedent in the beneficiaries since 1908.

NINTH: That there is justly due and owing to them from the United States on account of the matters hereinbefore set forth, the sum of $1931.39 with interest at 6% thereon from February 24, 1922.

TENTH: That your petitioners have made no assignment or transfer of their said claim or any part thereof, and that there are no credits or offsets due from them to the United States, and that they have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

Wherefore, your petitioners pray judgment against the United States for $1931.39 with interest as stated.

NORMAN W. BINGHAM, JR.,
ANNIE D. UPTON AND
GEORGE UPTON,
Executors of the Will of King Upton.
By GEORGE S. FULLER,
Attorney of Record.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. January 10, 1931.

Then personally appeared the above-named George S. Fuller and made oath that the statements of fact contained in the foregoing petition are true to the best of his knowledge and belief, except those stated to have been made upon information and belief, and that as to those he believes them to be true.

Before me

(Seal) SEYMOUR P. EDGERTON,
Notary Public.

At the same term, to wit, January 21, 1931, the following answer was filed:

ANSWER.

[Filed January 21, 1931.]

Now comes the respondent in the above-entitled action and for its answer to the petition on file herein denies each and every material allegation, item, count and particular in said petition contained.

By its Attorneys,

FREDERICK H. TARR,
United States Attorney.

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued from term to term to the March Term, A. D. 1932, when, to wit, April 7, 1932, the following motion to amend petition was filed by the petitioners and allowed by the court:

MOTION TO AMEND PETITION.

[Filed and Allowed April 7, 1932.]

Now come the petitioners and move that they be allowed to amend their petition as follows—

1. By striking out subparagraphs (c) and (d) of paragraph Fourth of the petition.

2. That paragraph Sixth of the petition be amended so as to read as follows—

> "SIXTH: That thereafter on or about May 28th, 1925 your petitioners duly filed with the Collector of Internal Revenue at Boston, Massachusetts, a claim for refund of the Federal Estate Tax in the amount of $1931.39 and on August 10th, 1925 filed with said Collector an amended claim for refund thereof, both said claims for refund being based on the illegal imposition of a tax on said policies of insurance and certain other policies."

3. That the amount of the wrongful tax referred to in paragraphs Fifth, Eighth and Ninth and in the prayer of the petition be changed from $1931.39 to $1174.79.

By their attorneys,
BURNHAM, BINGHAM, GOULD & MURPHY.

Assented to:
FREDERICK H. TARR, *United States Attorney.*
By J. DUKE SMITH, *Special Assistant to the United States Attorney.*

April 7, 1932,
BREWSTER, J. Motion granted, amendment allowed.

Attest, JOHN E. GILMAN, JR.,
Deputy Clerk.

This cause was thence continued from term to term to the June Term, A. D. 1933, when, to wit, June 30, 1933, the following statement of agreed facts was filed:

STATEMENT OF AGREED FACTS.

[Filed June 30, 1933.]

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, provided however, that this stipulation shall be without prejudice to the right of either part to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. King Upton, late of Marblehead in the Commonwealth of Massachusetts, was born April 12, 1862, and died on February 27, 1921.

2. The petitioners are the executors of the will of said King Upton.

3. The Annie D. Upton, hereinafter referred to, wife of the said King Upton, survived her husband, and is now living.

4. The George Upton hereinafter referred to, son of the said King Upton, survived his father and is now living.

5. The petitioners on February 25, 1922, filed with the Collector of Internal Revenue at Boston, Massachusetts, a Federal estate tax return for the Estate of King Upton. On the same day the petitioners paid to Malcolm E. Nichols, the then Collector of Internal Revenue, who in turn turned it over to the United States, the amount of tax shown by said return to be due, to wit: $8,415.43.

6. At various times during his lifetime the said King Upton took out *seventeen* policies of life insurance upon his own life. The proceeds from these seventeen policies of life insurance amounted to $88,284.96. After deducting the specific exemption of $40,000.00, the executors included in the federal estate tax return filed for the Estate of King Upton, deceased, the balance of the proceeds from these seventeen policies of life insurance, the amount of which is $48,284.96. The proceeds from ten of these life insurance policies amounted to $58,950.14, and as to these policies it is conceded by the plaintiff that the amount of the proceeds from said policies was properly included as a part of the statutory gross estate of King Upton, deceased, for federal estate tax purpose in view of the provisions of Section 402(f) of the Revenue Act of 1918, and these ten policies are not involved in this action. The plaintiff, however, contends that the remaining seven policies were improperly included as a part of the statutory gross estate of the said King Upton, deceased. These seven insurance policies with their respective dates, policy numbers, names of companies and the amounts of the proceeds, are as follows:

Exhibit No.	Policy No.	Company.	Date of Policy.	Amount of proceeds from Policy.
1.	35098	Berkshire Life Ins. Co.	6/1/1891	$5,025.80
2.	41714	" " " "	10/11/1893	5,152.59
3.	47954	" " " "	12/24/1895	5,028.05
4.	47955	" " " "	12/24/1895	5,028.05
				$20,234.49

		Less: Loan secured by above policies		5,900.00
				$14,334.49
5.	60061	The Manhattan Life Ins. Co.	10/9/1888	5,000.00
6.	60062	The Manhattan Life Ins. Co.	10/9/1888	5,000.00
7.	168175	The Connecticut Mutual Life Ins. Co. of Hartford,	5/22/1883	5,035.37
		Total value of proceeds.....		$29,369.86

A photostatic copy of each of said policies, together with the applications and all riders attached to the policies and all indorsements thereon, is attached hereto and it is stipulated and agreed that said copies are true and complete copies and that they may be received and used in evidence for all purposes for which the original policies might be used.

7. The premiums on all of the policies of life insurance referred to in paragraph 6 hereof were paid by King Upton out of his individual funds, from the time of their issuance up to the time of his death.

8. On June 8, 1925, the plaintiffs filed with the Collector of Internal Revenue at Boston, Massachusetts, a claim for refund in the amount of $1,931.39, and on August 12, 1925, the plaintiffs filed an amended claim for refund, a copy of which is hereto attached and marked "Exhibit A" and by reference is hereby made a part hereof.

9. On March 28, 1930, the Commissioner of Internal Revenue rejected the claim and the amended claim in their entirety.

10. No other action has been had on said claim in Congress or in any of the departments; no other action on said claim is pending in any court; no one other than the petitioners are the owners thereof or interested therein, and no assignment or transfer of this claim or any part thereof or of any interest therein has been made. The petitioners at all times have

borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER, *Counsel for Plaintiffs.*

FREDERICK H. TARR, *United States Attorney.*
By J. DUKE SMITH, *Special Assistant to the United States Attorney.*
Counsel for Defendant.

EXHIBIT 1.

No. 33096 Age 29

BERKSHIRE

LIFE INSURANCE COMPANY

Incorporated by the Legislature of Massachusetts 1851.

$ 111.50 = $ 5000

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company

In Consideration of the Application for this Policy and of the statements and agreements made in or upon which this Policy is based, and that the Insured shall pay to this Company at its Home Office in Pittsfield, Mass., or to its duly authorized agent, the premium mentioned in this Policy, and in consideration of the payment of the premiums hereinafter specified, does insure the Life of Rosy Upton of Salem Mass.

in the amount of Five thousand Dollars, for the term of life, with premiums, less the unpaid balance of any of the yearly premiums for which notes or credit may have been given, and interest on such deferred premiums if unpaid, the said Company, on the following conditions and also upon those regulations, rights and conditions stated on the back of this Policy, which are hereby declared to be and make part hereof, promises to pay at the office of the said Company in Pittsfield, Mass., to his Executors, Administrators, Assigns, upon due notice and proof as required by this Policy of the death of the said Rosy Upton during the continuance and before the termination of this Policy.

1.—The annual Premium of One hundred and ten Dollars and fifty cents shall be paid in advance on delivery of this Policy, and thereafter to the Company at its Home Office in Pittsfield, Massachusetts, on or before the first day of June at noon in every year during the continuance of this contract, and unless said premiums are so paid this contract shall be void, and all payments previously made upon it shall be forfeited to the Company, except as provided by the Statutes of Massachusetts now in force.

In Witness Whereof, the said BERKSHIRE LIFE INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, at its office in Pittsfield, Mass., the 1st day of June A. D. One Thousand Eight Hundred and Ninety Six.

Jas. W. Stull Secretary. William R. Plunkett President.

Received Nov. 1896 Dec. 1896 Jas. W. Stull Agt.

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD

Power of Agents. THAT no Agent, or other person, except the President, Vice-President, Secretary, or Treasurer of the Company, has power to extend the time for paying a premium, to issue a permit for residence, travel or occupation, or to bind the Company by making any promise; that no representation or information can be received or have effect which is not contained in the application for this Policy.

Payment of Premiums. THAT all premiums are due and payable at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made in exchange for the Company's receipt, signed by the President or Secretary.

Notice of when due waived. THAT notice that each and every payment is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and that any further notice, required by any statute, is hereby expressly waived.

Travel not Restricted. THAT the person whose life is insured by this Policy shall not, without the written assent of the Company, reside, travel, or visit outside the limits of the United States of America, the Dominion of Canada, Europe and the Bermuda Islands; but may make voyages upon the high seas in first-class vessels, by the usual routes, to and from ports within these limits.

Risks not assumed. THAT the insured shall not, without the consent of the Company in writing, engage in blasting, mining, submarine labor, aeronautic travel or excursions, the manufacture, handling or transportation of inflammable or explosive substances, service upon any railroad or any steamboat or other vessel, or in military or naval service of any kind in time of war.

Assignments. THAT the Company shall not be held to have notice of any assignment of this Policy until the original, or a duplicate thereof, is filed in the Company's Home Office; that the Company will not assume any responsibility for the validity of an assignment, and that before payment of the Policy the claim of an assignee shall be subject to proof of interest.

Suits. THAT no suit or proceeding shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Proofs of Death. THAT prompt notice of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death.

Dividends. THAT at the expiration of each period of five years, from the date of this Policy, it shall, if then in force, be credited with its share of the distributive surplus of the Company as determined and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of additional insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. This additional insurance may be surrendered, and upon due acquittance being made, the cash value thereof will be paid, or it may be applied to the reduction of premiums. If the death of the insured should occur after a distribution of surplus to this Policy, and before the next period of five years has expired, a post mortem dividend will be paid with the Policy. No other distributions of surplus shall be made on account of this Policy.

FIVE YEAR ENDOWMENT POLICY

THE

BERKSHIRE LIFE INSURANCE CO.

OF PITTSFIELD, MASS.

No 3[illegible]

Received of the Berkshire Life Insurance Company of Pittsfield, Massachusetts [illegible] Dollars, as per memorandum below, in full payment and satisfaction of the Policy of Insurance No [illegible] issued by said Company on the life of [illegible], now deceased, and all dividends on the same, and [illegible] do hereby quit-claim and surrender said Policy to the said Company, and all rights and claims under the same, and declare the same to be fully paid, satisfied, discharged and cancelled, and guaranty that [illegible] have good title to said Policy and legal right to surrender the same.

Amount of Policy	$ 5,000. 00	Cash	$
Amount of Additions		Note	[illegible]
Post Mortem Dividend	[illegible]	Interest on Note [illegible] to [illegible]	
		Deferred Premium	
	$ 5,0[illegible]		$ [illegible]

[illegible]

In consideration of [illegible] Company [illegible] Dollars [illegible] Policy [illegible] and [illegible] executed and delivered [illegible]

Dated at Middlefield, Mass. this 17 day of March A. D. 1911.

Witness:

[illegible]

Receipt to be executed above exactly as indicated to

Annie D. Upton, Executrix of [illegible]

Amount [illegible]

Less [illegible]

— Annual Payment $110.50

[illegible]

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company,

In Consideration of the Application on which this Policy is issued, and of the statements and agreements in said Application, all of which are hereby made a part of this Policy, and in further consideration of the payment of the Annual Premium of [illegible] Dollars and Cents, at the Home Office of this Company, to be evidenced by the receipt of the Company, and of the payment of the like sum, to be made at said office on or before the [illegible] day of [illegible] at noon, in every year, and also upon the conditions stated upon the back hereof, upon due notice and proof as required by this Policy, of the death of [illegible] of [illegible] promises to pay at the office of said Company in Pittsfield, Massachusetts, [illegible] Dollars to

his Executors, Administrators, or Assigns.

Upon the failure to pay, when due, any annual premium after the second, this Policy shall become paid-up in manner and for the amount now provided by the Statutes of the Commonwealth of Massachusetts; and it may be surrendered on any anniversary of its issue for its cash value as determined by said Statutes, upon the execution and delivery to the Company, at its Home Office in Pittsfield, Massachusetts, of a satisfactory release of all interests and claims to the avails thereof.

In Witness Whereof, the said BERKSHIRE LIFE INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, at its office in Pittsfield, Mass., the [illegible] day of [illegible] A. D. One Thousand Eight Hundred and Ninety [illegible].

[illegible] Secretary

[illegible] President

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD.

Powers of Agents. THAT no Agent or other person, except the President, Vice President, Secretary, or Treasurer of the Company, has power to extend the time for paying a premium, to issue a permit for residence, travel or occupation, or to bind the Company by making any promise, that no representation or information can be received or have effect which is not contained in the application for this Policy.

Payment of Premiums. THAT all premiums are due and payable at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made by exchange for the Company's [illegible], signed by the President or Secretary.

Notice of when due waived. THAT notice that each and every payment is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and that any further notice, required by any statute, is hereby expressly waived. The payment and receipt of any premium less than a full annual premium shall not continue this Policy in force more than three months in case of a quarterly premium payment, or six months in case of a semi-annual payment.

Travel and Residence. THAT the person whose life is insured by this Policy shall not, within two years after the date of this Policy, without the written consent of the Company, reside, travel, or visit outside the limits of the United States of America, the Dominion of Canada, Europe and the Bermuda Islands, but may make voyages upon the high seas, by the usual routes and means of conveyance, to and from ports within said limits.

Exceptions. THAT the insured shall not, during the first two years of this Policy, without the consent of the Company in writing, engage in or be employed in blasting, mining, submarine labor, the manufacture, handling or transportation of inflammable or explosive substances, or service upon any railroad or any steamboat or other vessel, nor at any time in any military [illegible] or expedition, nor, without such consent in writing, in military or naval service of any kind in time of war.

Assignments. THAT the Company shall not be held to have notice of any assignment of this Policy until the original, or a duplicate thereof, is filed in the Company's Home Office; that the Company will not assume any responsibility for the validity of an assignment, nor that before payment of the Policy the claim of an assignee shall be subject to proof to the satisfaction of the Company.

Proofs of Death. THAT prompt notice of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death. No action shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Indebtedness. THAT the amount for more if any, of the year's premium and all premiums for which notes or credit may have been given, or interest on [illegible] notes, shall be a lien upon this Policy, and shall be deducted from the amount at any time due and to be paid on account of this Policy.

Insurable Interest. THAT at the expiration of each period of five years, from the date of this Policy, it shall, if then in force and if the premiums due on it have been paid as above, be credited with its share of the distributive surplus of the Company as ascertained and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of a paid-up insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. This paid-up insurance may be surrendered, and the cash value thereof paid, or it may be applied to the reduction of premiums. If the death of the insured shall occur after a full [illegible] of surplus to this Policy, and before the next period of five years has expired, a portion of such dividend will be paid with the Policy.

Under the terms of the Massachusetts Insurance Act of 1887, this Policy will have paid-up and cash-surrender values at the end of each policy year as stated below, provided all the annual premiums due have been paid in cash to that time. Any [illegible] given will diminish these values, and any dividend additions outstanding will increase them.

TABLE OF PAID-UP AND CASH-SURRENDER VALUES.

YEAR	PAID-UP INSURANCE	CASH	YEAR	PAID-UP INSURANCE	CASH
[illegible]	$ [illegible]	1700	20th	$ 20105	9044.5
[illegible]	$ [illegible]	6810	21st	$ 21314	9915.5
3rd	$ [illegible]	12075	22nd	$ 22514	10599.0
4th	$ [illegible]	17544	23rd	$ 23665	11394.5
5th	$ 6 [illegible]	23170	24th	$ 24764	12207.5
6th	$ 716	29995	25th	$ 2979	16411.00
7th	$ [illegible]	35065	30th	$ 3405	20124.5
8th	$ 10124	41220	35th	$ 3750	25259.5
9th	$ 13224	47644.5	40th	$ 4044	29518.5
10th	$ 15760	54290	45th	$ 4275	33444.0
11th	$ 17476	61144.5	50th	$ 44456	36970.9
12th	$ 16304	68215	55th	$	$
13th	$ 17614	75460	60th	$	$
14th	$ 19194	82900			

NOTE. The values at the end of any year other than the above will be given upon application at the Company.

OPTIONAL POLICY

The
Berkshire
Life Insurance Co.
Pittsfield, Mass.

No. 41714

Received of the Berkshire Life Insurance Company of Pittsfield, Massachusetts, Five thousand fifty-two and 59/100 ---------- Dollars, as by memorandum below, in full payment and satisfaction of the Policy of Insurance No. 41714 issued by said Company on the life of [illegible], now deceased, and all dividends on the same; and I do hereby quit-claim and surrender said Policy to the said Company, and all rights and claims under the same, and declare the same to be fully paid, satisfied, discharged and cancelled, and guaranty that I have good title to said Policy and legal right to surrender the same.

Amount of Policy	$ 5,000.00	Cash	$ 4,870.59
Amount of Additions	---------	Note [illegible] 1919	47[illegible]
Post Mortem Dividend	60.40	Interest on Note 191 to 191	---------
[illegible]	110.19	Deferred Premium	---------
	$ 5,171.59		$ 5,171.59

It is hereby requested that the amount above stated be paid as follows.

In consideration of this payment, I hereby agree to indemnify and keep harmless from all cost and liability in respect of any and all estate taxes or duties thereof.

Dated at Pittsfield, Mass. this 12 day of March A. D. 1921

Witness

Receipt to be executed above exactly as indicated by

Annie J. Upton, assignee - wife of the Insured.

EXHIBIT 3.

BERKSHIRE LIFE INSURANCE COMPANY

Incorporated by the Legislature of Massachusetts, 1851.

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company,

In Consideration of the Application on which this Policy is issued, and the statements and agreements in said Application, all of which are made a part of this Policy, and in further consideration of the payment of the Annual Premium of One hundred twenty eight Dollars and fifty Cents, at the Home Office of this Company, to be evidenced by the receipt of the Treasurer, or by the payment of the like sum, to be made at said office on or before the twenty fourth day of December at noon, in every year, and also upon the conditions stated upon the back hereof, upon due proof and notice as required by this Policy, of the death of Mary Upton of Salem Mass. promises to pay at the office of said Company in Pittsfield, Massachusetts Ten thousand Dollars to

his Executors, Administrators, or Assigns.

Upon the failure to pay, when due, any annual premium after the second, this Policy shall become paid-up in manner provided for the amount now provided by the Statutes of the Commonwealth of Massachusetts; and it may be surrendered on any anniversary of its issue for its cash value as determined by said Statutes, upon the execution and delivery to the Company, at its Home Office in Pittsfield, Massachusetts, of a satisfactory release of all interests and claims to the avails thereof.

In Witness Whereof, the said BERKSHIRE LIFE INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, at its office in Pittsfield, Mass., the 29th day of December A. D. One Thousand Eight Hundred and Ninety four

December 27 1894 Mary Ostbridge Salem Mass.

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD.

Agents. THAT none of the agents named for the President, Vice-President, Secretary, or Treasurer of the Company, has power to [illegible] or to [illegible] a contract for insurance, travel or exemption, or to bind the Company by making any promise, or by receiving notice of, permission or waiver of any of the conditions of the Policy, shall be binding upon the Company unless such agent is specially and [illegible] by one of the officers named, that such representation or information can be received or waiver or such notice received by the application for this Policy.

Payment of Premiums. THAT all premiums are to be paid at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made payable to the Company's receipt, signed by the President or Secretary.

Notice of other insurance. THAT notice that any premium or [illegible] is due at the date named in the Policy is given and accepted by the delivery and acceptance of [illegible] further notice, or precisely any custom is hereby expressly waived. The payment and receipt of any premium [illegible] a full annual premium shall not continue this Policy in force more than three months in case of a [illegible] unless [illegible] months in case of a semi-annual payment.

Travel. THAT the insured [illegible] insured by the Policy shall not, within two years after the date of this Policy, without the written consent of the Company, reside, travel, or visit outside the limits of the United States of America, the Dominion of Canada, Europe and the Bermuda Islands; but may make voyages upon the high seas by the usual routes and means of conveyance, to and from ports within those limits.

Exceptions. THAT the insured shall not, within [illegible] and two years of this Policy, without the consent of the Company in writing, engage, as an occupation, in electric, mining, submarine labor, the manufacture, handling or transportation of inflammable or explosive substances or fireworks upon any railroad or any steamboat or other vessel, nor at any time in any hostile travel or adventure, [illegible] consent such consent in writing, in military or naval service of any kind in time of war.

Assignment. THAT the Company shall not be bound by any assignment of this Policy until the original, or a duplicate thereof, is filed in the Company's Home Office, that the Company will not assume any responsibility for the validity of an assignment, and that before payment of the Policy the amount of an assignee shall be subject to proof to the satisfaction of the Company.

Proofs of Death. THAT proofs of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death. No action shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Indebtedness. THAT the unpaid balance of any of the year's premium and all premiums for which notes or credit may have been given, and interest on all or any obligations remaining unpaid shall be a lien upon this Policy, and shall be deducted from the amount at any time due and to be paid on account of the Policy.

Dividends. THAT at the expiration of each period of five years from the date of this Policy, it shall, if then in force and if the premiums have been fully paid, participate to the extent therein provided with its share of the distributable surplus of the Company as determined and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of paid-up insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. This paid-up insurance may be surrendered for its cash value. If the death of the insured should occur after a distribution of surplus to this Policy, and before the next period of five years has expired, a post-mortem dividend will be paid with the Policy.

Under the terms of the Massachusetts Insurance Act of 1887, this Policy will have paid-up and cash-surrender values at the end of each policy year as stated below, provided all the annual premiums due have been paid in cash to that time. Any credit given will diminish these values, and any dividend additions outstanding will increase them.

TABLE OF PAID-UP AND CASH-SURRENDER VALUES.

YEAR	PAID-UP INSURANCE	CASH	YEAR	PAID-UP INSURANCE	CASH
2d	$ [illegible]	$ 2605	10th	$ [illegible]	$ 10220
3d	$ [illegible]	$ 5205	11th	$ [illegible]	$ 10375
4th	$ [illegible]	$ 10410	12th	$ 23561	$ 11900 45
5th	$ [illegible]	$ 20605	13th	$ 24770	$ 12744 30
6th	$ [illegible]	$ 27015	20th	$ 25500	$ 13617 30
7th	$ [illegible]	$ 33620	25th	$ 30000	$ 19000 00
8th	$ [illegible]	$ 40405	30th	$ 34199	$ 23675 50
9th	$ [illegible]	$ 47560	35th	$ 38410	$ 27855 55
10th	$ [illegible]	$ 54045	40th	$ 41114	$ 31356 60
11th	$ [illegible]	$ 60315	45th	$ 42333	$ 35166 62
12th	$ [illegible]	$ 69965	50th	$ 42819	$ 35577 60
13th	$ [illegible]	$ 77765	55th	$	$
14th	$ [illegible]	$ 85710	60th	$	$
15th	$ [illegible]	$ [illegible]			

OPTIONAL POLICY

No. 11,[illegible]

The

Berkshire

Life Insurance Co.

Pittsfield, Mass.

INSURANCE ON THE LIFE OF

Mary Upton

AMOUNT.

$3000.

DATE OF POLICY.

December 28 1903

ANNUAL PAYMENT, $23.30

MAR 1[illegible] 21

1 of 7

EXHIBIT 4.

Nov 4 1893 — Age 31

BERKSHIRE
LIFE INSURANCE COMPANY

$198.20 PREMIUM — $3,000.00 AMOUNT

THIS POLICY OF INSURANCE

Witnesseth that the Berkshire Life Insurance Company,

In Consideration of the Application on which this Policy is issued, and of the statements and agreements in said Application, all of which are hereby made a part of this Policy, and in further consideration of the payment of the Annual Premium of — One hundred & ninety eight — Dollars and — 20 — Cents, at the Home Office of this Company, to be evidenced by the receipt of the Company, and of the payment of the like sum, to be made at said office on or before the twenty fourth — day of — December — at noon, in every year, and also upon the conditions stated upon the back hereof, upon due notice and proof as required by this Policy, of the death of — — — — Benj H Olin — — — — of — Pittsfield Mass — promises to pay at the office of said Company in Pittsfield, Massachusetts, — Three thousand — Dollars to — — — —

CONDITIONS REFERRED TO IN THIS POLICY,

AND UPON WHICH IT IS ACCEPTED AND HELD.

Agent's Agency. "THAT no Agent or other person except the President, Vice-President, Secretary, or Treasurer of the Company, has power to extend the time of paying a premium, to issue a permit for residence, travel or occupation, or to bind the Company by making any promise or representation, or by granting waiver of any of the conditions of the Policy, unless upon the Company's own printed form in writing and signed by one of the officers named; that no representation or information can be received or made which is not contained in the application for the Policy.

Payment of Premiums. "THAT all premiums are due and payable at the Home Office of the Company in Pittsfield, Massachusetts, but will be accepted elsewhere, when duly made in exchange for the Company's receipt, signed by the President or Secretary.

Notice of which days waived. "THAT notice that each and every payment is due at the date named in the Policy is given and accepted by the delivery and acceptance of this Policy, and that no further notice, required by any statute, is hereby expressly waived. The payment and receipt of any premium other than a full annual premium shall not continue this Policy in force more than three months or such further period as may be specified in case of a semi-annual payment.

Travel and Residence. "THAT the person whose life is insured by this Policy shall not, within two years after the date of this Policy, without the written consent of the Company, reside, travel, or visit outside the Dominion of Canada, Europe and the Mediterranean, but may make voyages upon the high seas, by the usual routes and means of conveyance, to and from ports within these limits.

Engaging Aboard. "THAT the insured shall not, during the first two years of this Policy, without the consent of the Company in writing, engage as a sailor, except in ordinary coasting navigation, in blasting, mining, or quarrying, or in any similar occupation, or in any manufacture of explosive substances, or serve upon any vessel of any steamboat or other vessel, nor at any time in any war, riot or insurrection, without such consent in writing, in military or naval service of any kind in time of war.

Assignment. "THAT the Company shall not be held to have notice of any assignment of this Policy unless the original, or a duplicate thereof, is left with the Company's Home Office, nor the Company will not assume any responsibility for the validity of an assignment, and that before payment of the Policy the validity of any assignment shall be subject to proof to the satisfaction of the Company.

Proofs of Death. "THAT prompt notice of the death of the insured under this Policy shall be given to the Company, and formal proofs thereof, in accordance with the rules of the Company, shall be furnished within one year after the said death. No action shall be brought against the Company under this Policy after the expiration of two years from the time when the right of action first accrues.

Indebtedness. "THAT the amount value at any of the year's premium and all premiums for which notes or credit may have been given, and interest or other obligations remaining unpaid, shall be a lien upon this Policy, and shall be deducted from the amount at any time due and to be paid on account of this Policy.

Dividends. "THAT at the expiration of each period of five years from the date of this Policy it shall participate and if the premiums have been fully paid up to the [illegible] period, receive its share of the distributable surplus of the Company as determined and apportioned by its Board of Directors. Such share shall be applied by the Company in the purchase of a paid-up insurance upon the person whose life is insured by this Policy, payable when the Policy becomes due. The paid-up insurance may be surrendered for its cash value. If the death of the insured should occur after a distribution of surplus to this Policy, and before the next period of five years has expired, a post-mortem dividend will be paid with the Policy.

Under the terms of the Massachusetts Insurance Act of 1887, this Policy will have paid-up and cash-surrender values at the end of each policy year as stated below, provided all the annual premiums due have been paid in cash to that time. Any credit given will diminish these values, and any dividend additions outstanding will increase them.

TABLE OF PAID-UP AND CASH-SURRENDER VALUES.

YEAR	PAID-UP INSURANCE	CASH	YEAR	PAID-UP INSURANCE	CASH
1st	$ [illegible]	2605	16th	$ 3117	103090
2d	$ [illegible]	6405	17th	$ 3230	0103375
3d	$ [illegible]	10410	18th	$ 3356	1108 45
4th	$ [illegible]	14605	19th	$ 3490	137430
5th	$ [illegible]	27015	20th	$ 3580	136120
6th	$ [illegible]	33540	21st	$ 3660	100000
7th	$ 10[illegible]	40405	30th	$ 3499	226750
8th	$ 11640	47560	35th	$ 3240	271555
9th	$ 12810	54845	40th	$ 1114	313560
10th	$ [illegible]	62315	45th	$ 1333	351662
15th	$ 15794	69965	50th	$ 1509	385700
20th	$ 17731	77765	55th	$	
25th	$ [illegible]	85710	60th	$	
30th	$ [illegible]	93795			

NOTE.—The values at the end of any year other than the above will be given upon application to the Company.

OPTIONAL POLICY

The

Berkshire

Life Insurance Co.

Pittsfield, Mass.

No 47272

Received of the Berkshire Life Insurance Company of Pittsfield, Massachusetts, Five thousand two hundred [illegible] Dollars, as by memorandum below, in full payment and satisfaction of the Policy of Insurance No 47272 issued by said Company on the life of [illegible], now deceased, and all dividends on the same, and I do hereby quit-claim and surrender said Policy to the said Company, and all rights and claims under the same, and declare the same to be fully paid, satisfied, discharged and cancelled, and guaranty that I have good title to said Policy and legal right to surrender the same.

Amount of Policy	$ 5,000.00	Cash	$ 5,200.00
Amount of Additions	---------	Note	---------
Post Mortem Dividend	209.05	Interest on Note ---- 191 to ---- 191	---------
		Deferred Premium	---------
	$ 5,209.05		$ 5,200.00

It is hereby requested that the amount as above stated be paid on delivery.

* In consideration of this request, I hereby & [illegible] Company harmless from all cost and liability by reason of [illegible] taxes on account hereof.

Dated at Pittsfield, Mass., this 12 day of April A. D. 1911.

Witness [illegible] [illegible]

Receipt to be executed above exactly as indicated by

Annie D. Upton, Assignee - wife of the insured.

The original and duplicate Assignment should be sent to the Home office of the Company, where date of receipt will be endorsed and receipt made. The original will be retained on file and the duplicate returned.

Assignment. Ed 1902. Form E. 1M.

Policies 35 098 111 7111 112 7454 112 7455 (ORIGINAL)

In consideration of four & fifty dollars

do hereby assign all right, title and interest in Policy number 35 098 111 7111 112 7454 112 7455 issued by the

NEW YORK AND BOSTON

Berkshire Life Insurance Company of Pittsfield, Mass.

insuring the life of King Upton

of Boston, Mass and all additions to said policy, whether now or hereafter apportioned, (reserving and excepting the right to the assured to apply the cash value of any dividends or additions thereon in payment of premiums hereafter due on said policy) unto the said assignee, his executors, administrators and assigns, subject to the conditions and agreements in the Policy and to the By-laws of the Company. Dated June 30, 1902.

Dated at Boston, Mass. this 30th day of July

A. D. 19 02.

In presence of

Thos. Cowell

Elizabeth Toll

(Refer to Exhibits 1, 2, 3, + 4.)

Sum Insured. $ 5000.- No. (——— Annual Premium. $ 81.95

EXHIBIT 5.

The Manhattan Life Insurance Company

OF NEW YORK

In Consideration of the Application for this Policy, and the statements and covenants therein contained, which are a part of this contract, and of the ——— annual premium of Eighty one ——— 95 Dollars, to be paid in advance to the Company at its office in the City of New York, on the delivery of this Policy, and thereafter on the tenth ——— day of October ——— in every year, during the term of this Policy, **Insures** the life of King Upton ——— of Salem ——— in the County of Essex ——— and State of Massachusetts and will pay at its said office in the City of New York to his son George Upton ——— ——— his executors, administrators or assigns, first deducting therefrom any indebtedness on account of this Policy, ——— Five Thousand ——— Dollars ——— upon satisfactory proof at its said office of the death of the insured during the continuance of this Policy upon the following conditions:

I.—If any statement made in the application be in any respect untrue, or if any premium or interest on any note given on account of a premium be not paid when due, or if the insured die in consequence of any violation of law, or if he engage in any naval or military service except in the militia not in actual service, this Policy shall be void and all payments made upon it shall be forfeited to the Company: except, after being in force three full years, this Policy shall be incontestable for any misstatement in the application except as to age and if it shall lapse or become forfeited for the non-payment of any premium or interest on any note given on account of a premium the Company will, upon the surrender of this Policy within six months after such lapse, issue a non-participating paid up Policy for such sum as the legal net reserve on this Policy, at the time of lapsing, will purchase as a single premium at the Company's present published rates.

II.—Proof of death shall be furnished to the Company within two years after death, and shall contain full answers under oath to the questions in the Company's blanks, and no suit shall be brought against the Company on this Policy after two years from the time when the cause of action accrues.

III.—No provision of this contract can be changed or waived except by a written agreement, signed by the President or Secretary of the Company.

This Policy shall not participate in profits.

In Witness Whereof, The Manhattan Life Insurance Company has hereunto affixed its Corporate Seal, and by its President and Secretary signed and delivered this contract at the City of New York, this tenth ——— day of October ——— one thousand eight hundred and eighty eight ———

PAID

President.

Secretary.

A. [illegible]

Sum Insured $ 5000 — Annual Premium $ 87.1 —

The Manhattan Life Insurance Company

OF NEW YORK

In Consideration of the Application for this Policy, and the statements and covenants therein contained, which are a part of this contract, and of the annual premium of Eighty One ——— Dollars, to be paid in advance to the Company at its office in the City of New York, on the delivery of this Policy, and thereafter on the first day of October on every year, during the term of this Policy,

Insures the life of King Hyde of Ga. in the County of Lowndes and State of Georgia and will pay at its said office in the City of New York to Mrs. Mary Hyde Lowndes executors, administrators or assigns, first deducting therefrom any indebtedness on account of this Policy, Five Thousand ——— Dollars upon satisfactory proof at its said office of the death of the insured during the continuance of this Policy upon the following conditions:

I. If any statement made in the application be in any respect untrue, or if any premium or interest on any note given on account of a premium is not paid when due, or if the insured die in consequence of any violation of law, or if he engage in any naval or military service except in the militia not in actual service, this Policy shall be void and all payments made upon it shall be forfeited to the Company: except, after being in force three full years, this Policy shall be incontestable for any misstatement in the application except as to age and if it shall lapse or become forfeited for the non-payment of any premium or interest on any note given on account of a premium the Company will, upon the surrender of this Policy within six months after such lapse, issue a non-participating paid up Policy for such sum as the legal net reserve on this Policy, at the time of lapsing, will purchase as a single premium at the Company's present published rates.

II. Proof of death shall be furnished to the Company within two years after death, and shall contain full answers under oath to the questions in the Company's blanks, and no suit shall be brought against the Company on this Policy after two years from the time when the cause of action accrues.

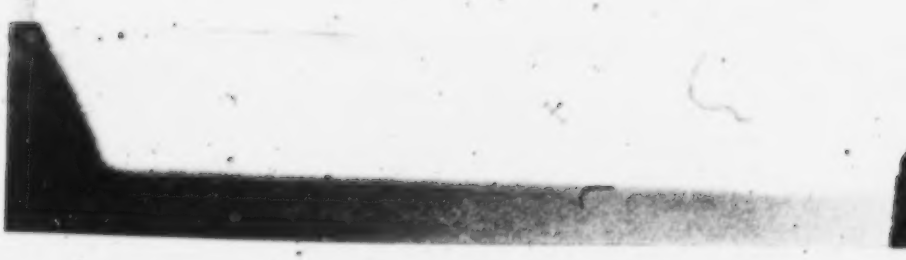
III. No provision of this contract can be changed or waived except by a written agreement, signed by the President or Secretary of the Company.

In Witness Whereof, The Manhattan Life Insurance Company has hereunto affixed its Corporate Seal, and by its President and Secretary signed and delivered this contract at the City of New York, this ——— day of October one thousand eight hundred and eighty one

PAID

President.

Secretary.



The blank spaces below are to be filled up only at the Home Office.

No. 60,061
60,061

APPLICATION OF

King Wilson

TO

The Manhattan Life Insurance Company

OF NEW YORK.

Date Oct 13 1847.

Albany: J. ..., Printer, 1847.

EXHIBIT "7"

The Connecticut Mutual Life Insurance Company of Hartford, Conn.

In Consideration of the application for this insurance, which is a part of this Contract, and a copy whereof is hereunto annexed, and of the several answers therein contained, and that the applicant doth warrant the same to be in all respects true, and of the annual premium of Two Hundred Thirty-seven ——— 00/100 Dollars to be paid to them on or before the Twenty-second day of May — in every year for the term of ten years from A D one thousand eight hundred and eighty-three ——— to one thousand eight hundred and ninety-two ——— inclusive,

Do Hereby Insure the Life of

King Upton

the Insured, of — Salem ——— County of — Essex ———

State of — Massachusetts ——— for the term of his natural life,

In the Sum of ——— Five Thousand ——— **Dollars,**

the said sum insured to be paid at the office of said Company, in Hartford, Conn.,

to — Annie Upton ——— (the Assured,) wife of the said Insured, for her sole use and benefit, or to her legal representatives, thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at said office in Hartford, Conn., and upon surrender and satisfactory release hereof; or if the said Assured die before said Insured, the said sum insured shall be payable as above to his children, or to their guardian, if under age; or, if there be no such children or descendants of such children then living, the said sum insured shall be payable to the legal representatives of the said Insured; any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this Policy being first deducted therefrom; **2nd**, if, after the payment of two or more annual premiums as above, any subsequent premium or instalment of premium be not paid when due, said Company do thereupon and thereafter and upon the same considerations hereinbefore set forth, but without further payment of premiums, insure said life for said term but only in a sum to be ascertained by the Table of Paid-up Insurance endorsed hereon and hereby made a part of this Contract, such sum to be payable at the time and place and in the manner and to the persons above named; and it is agreed by all the parties hereto that this provision is and shall be in substitution for and in waiver of their several rights under any law of any State relating to the lapse or forfeiture of policies of life insurance; **3rd** at the end of ten years from the date hereof, or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay a Cash Value therefor, to be ascertained by the Table of Cash Values endorsed hereon and hereby made a part of this Contract; such Cash Value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to and this Policy to be first released and discharged to the satisfaction of said Company by — King Upton, the Assured ——— ; and it is hereby agreed by all the parties hereto that such surrender, release, and discharge shall terminate this Policy, and any and every obligation whatsoever of said Company thereunder, to any and every person whatsoever:

Subject to the Conditions and Agreements upon the second page of this Policy, which are hereby referred to and made a part of this Contract.

In Witness Whereof, the said The Connecticut Mutual Life Insurance Company have, by their President and Secretary, signed and delivered this Contract, in the City of Hartford, State of Connecticut, Twenty-second day of — May — A. D. one thousand eight hundred and eighty-three ———

W G Morgan Secretary ——— Eaton Chapman ——— Vice President.

THIS POLICY

is issued upon the [illegible] upon Conditions and Agreements, referred to on the first page, and made a part of the Contract.

1st. That the contract between the Company and the Insured is wholly expressed and contained in this Policy, and the Application therefor, which Application is hereby made a part hereof, and that the several answers contained in said Application are warranted by the Insured thereby to be true in all respects, and further that no statement or declaration made by any Agent, Solicitor or Broker of the Company, or by the Insured in said Application, shall be taken or considered to be binding upon or bind the Company in the event of a claim hereunder, unless the same shall be reduced to writing and signed by the Insured, and the said Application, a copy of which is hereto annexed, shall be taken and held to be and to contain the only answers, or statements or representations made to this Company on behalf of the Insured; and that if this Policy has been obtained by or through any fraud, misrepresentation or concealment, then the same shall be absolutely null and void.

PAYMENT OF PREMIUMS.

2nd. That this Policy shall not be in force and binding on the Company unless the annual Premium herein shall have been actually paid during the lifetime of the Insured, and that if any subsequent Premium, or instalment of Premium, on this Policy be not paid when due, then this Policy shall cease and determine, and be null and void, except as to the surrender provided upon the payment of two or more annual premiums, and that no Premium or Premiums shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company, and such receipt countersigned by the Agent of the Company at the place where such Premium is payable, if payable to an Agent of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such payment may be made to any agent or corresponding agent of the Company for collection, and payment to such agent or correspondent shall be held to have been made at such office of the Company.

RISKS NOT INSURED AGAINST UNDER THIS CONTRACT.

3rd. The following risks are not assumed by this Company under this contract:

Duelling or fighting

Death while personally engaged or employed in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody, or transportation of highly inflammable or explosive substances or upon railroads or upon any steam, sea vessel, canal, river, lake, or railroad, or in any military or naval service whatsoever, whether voluntarily or otherwise (the militia when not in actual service always excepted), or as a member of any paid fire department, or from any accident or injury received while so engaged, without the consent of this Company previously given in writing.

Suicide, sane or insane

Death as a consequence of duelling, or in the violation of law or consequent thereon, or as a consequence of felony.

Suicide not included as risk

The self-destruction of the Insured, whether voluntary or involuntary, and whether he be sane or insane at the time thereof.

Intemperance not insured against

Death in a state of delirium, or from any disease in any degree produced by or resulting from the occasional or habitual use of alcoholic or narcotic stimulants, or from any accident or violence received while in a state of intoxication, or which there would have been defective memory, or any injury to or impairment of the health from such use.

In each and every of the foregoing cases this Policy shall become and be null and void.

FORFEITURE OF PREMIUMS.

4th. **That in every case in which this Policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this Company, except as hereinbefore provided.**

RETURN OF THE RESERVE IN CASE OF BREACH OF CERTAIN CONDITIONS.

5th. In case this Policy shall become and be null and void by reason of any matter or thing set forth in the first of these conditions, or by reason of the doing, happening, or being of any such condition or thing not hereby insured against as provided in the third of these conditions, the Company will, upon surrender and satisfactory release thereof within one year after the same shall have been ascertained to be or to have become null and void and not afterward, return to the assured the then net reserve upon this Policy according to the American Table of Mortality, assuming three per centum compound interest.

ASSIGNMENT AND SURRENDER.

6th. That no assignment of this Policy shall be valid, but the Company shall have power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the person nominated therein as payee of the Cash Value at stipulated periods.

AUTHORITY OF AGENTS.

7th. That Agents of the Company have no power or authority to make, alter, change, or modify any of the terms, conditions, or agreements of this Policy, or to waive forfeitures thereof, and that no alterations, change, modifications, waiver, or subsequent agreement whatever respecting this Policy shall be binding on said Company unless made in writing signed by the executive officers thereof.

PLACE OF CONTRACT.

8th. It is agreed that this Policy is issued and delivered at Hartford, in the State of Connecticut, and is to be in all respects construed and determined in accordance with the laws of that State.

United States of America

TREASURY DEPARTMENT

WASHINGTON

February 12, 19 31.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the ted States Code (Section 882 of the Revised Statutes of the United States), ereby certify that the annexed are true copies of Claim for Refund of 931.39, Estate Tax (with statement attached), filed by Norman W. Bingham, , Annie D. Upton and George Uptor, Executors of Estate of King Upton, late Marblehead, Massachusetts, c/o Norman W. Bingham, Jr., Boston, Massachusetts; y of letter, undated, to George Uptor, et al., Executors, Estate of King Upton, ton, Massachusetts, from Robt. H. Lucas, Commissioner.

on in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

W. A. Mirfield,

Chief Clerk, Treasury Department.

1930—TREASURY DEPARTMENT, CHIEF CLERK AND SUPERINTENDENT.

CLAIM FOR V 63

ABATEMENT OF TAX ASSESSED
CREDIT AGAINST OUTSTANDING ASSESSMENTS
X REFUND OF TAXES ILLEGALLY COLLECTED
REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of Massachusetts
County of Suffolk } ss:

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

OFFICE OF INTERNAL REVENUE RECEIVED AUG 22 1925

Collection District
Account number
Date received

Norman W. Bingham, Jr., Annie D. Upton and George Upton
(Name of taxpayer or purchaser of stamps)

TYPE OR PRINT

Executors of Estate of King Upton, late of Marblehead, Mass.
(Residence—give street and number or post office, city or town and State)

C/o Norman W. Bingham, Jr., 31 Federal St., Boston, Mass.
(Business address)

This deponent, being duly sworn according to law, deposes and says that this claim is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From	
To	

1. Business in which engaged
2. Character of assessment or tax Estate Tax
(State tax or upon what the tax assessment is based, if stamps)
3. Amount of assessment or stamps purchased $ 3415.43
4. Reduction of Tax Liability requested (Income and Profits Tax) $
5. Amount to be abated $
6. Amount to be refunded (or such greater amount as is legally refundable) $ 1931.39
7. Date of payment (see Collector's receipts or indorsements of canceled checks) February 24, 1922
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Boston, Mass.
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked, period from to $

Deponent verily believes that this application should be allowed for the following reasons:

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 7 day of August, 1925.

Signed Norman W. Bingham
for self and executors

(Title)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

8

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Schedule No.

Name of taxpayer	Character of assessment and period covered.	Lin.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
		F 30A	1922	Feb.	4	7	$ 5415 43	2/25/25	Mass
Estate of King Upton, N.W. Bingham, Jr. et al., Executors, Federal St., Salem, Mass.	Estate	"	1926	2d Sup.	1	4	39538 20		

Malcolm E. Nichols
Collector of Internal Revenue.

MCK
Asst.
Assistant Chief, Commissioner's Office.

Claim No.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	Period commencing.
					$		

Collector ..... District .....

Schedule No.

Schedule Number .....

District .....

Allowed or Rejected Number .....

(Nature of tax.)

Claimant .....

Address .....

Examined and submitted for action 19

COMMITTEE ON CLAIMS

Claim examined by—
OKS
Claim approved by—
H. H. Chandler
Chief of Division.

Amount claimed... $.....

Amount allowed... $.....

Amount rejected... $.....

In accordance with the provisions of Section 402 (f) of the Act of 1918 and of Article 32 of Regulations 37, there was included in the return for Federal Estate tax filed for the estate of [illegible] Upton, late of Marblehead, Mass. by the executors of said estate, the amount of $39,284.96, representing insurance payable to individual beneficiaries. Of this amount $40,000 was exempt from tax, leaving a balance claimed by the Department to be taxable, and on which tax was paid, in accordance with said Section 402 (f) of said Article 32 of $40,282.96.

On May 22, 1925, the executors of said estate filed a claim for refund of $1931.39, being the amount of estate tax paid on said $40,282.96 at the rate of 4%. Taxpayers based that claim for refund on the decision of the District Court of the United States for the Western District of Pennsylvania in the case of Frick et al. v. Lewellyn, Collector.

To assist the Department in applying to this claim the principals enunciated by the Supreme Court in its opinion (May 11, 1925) deciding the above case, the following supplementary information is given concerning the policies in question.

The following policies which were included as a part of the gross estate of the decedent in the return for Federal estate tax filed by the taxpayers, were taken out by the decedent, and in case of change of beneficiary assigned to designated beneficiaries, before any estate tax act was passed. Under the decision of the Supreme Court the Act did not refer to transactions prior to 1916 and these policies should not have been included or considered at all in the return for Federal Estate tax:

Name of Company	No. of Policy	Date of Issue	Date of last assignment, if any	Name of Person Receiving Insurance	Full Amount Received
Berkshire Life Ins. Company	35090	June 1, 1871	July 25, 1904	Annie D. Upton	
" " "	41714	Oct. 11, 1893	" "	Annie D. Upton	
" " "	47984	Dec. 24, 1895	" "	Annie D. Upton	$14299.45
" " "	47985	Dec. 24, 1895	" "	Annie D. Upton	
Manhattan Life Ins. Company	60061	Oct. 9, 1888	----	Annie D. Upton	5000.00
" " "	60062	Oct. 9, 1888	-----	George Upton	5000.00
National Life Ins. Co. Montpelier, Vt.	85895	June 18 1892	July 28, 1904	Annie D. Upton	10072.51
Fidelity Mutual Life Ins. Co., Philadelphia, Pa.	209407	Dec. 7, 1908	-----	Annie D. Upton	10000.00
Connecticut Mutual Life Ins. Co.	168178	May 22, 1883	-----	Annie D. Upton	5035.37
					$49407.53

Following is a complete list of the policies of insurance taken out by the decedent, and in case of change of beneficiary assigned by him to designated beneficiaries, subsequent to the passage of the estate tax act:

Name of Company	No. of Policy	Name of Person Receiving Insurance	Full Amount Received
Mutual Benefit Life Ins. Co. Newark, N. J.	345891	Annie D. Upton	$5052.62
Berkshire Life Ins. Co. Pittsfield, Mass.	190589	Annie D. Upton	3035.04
Mutual Life Ins. Co. of N. Y.	383891	Annie D. Upton	5018.82
New England Mutual Life Ins. Co.	101312	Annie D. Upton	12387.60
New England Mutual Life Ins. Co.	110070	Annie D. Upton	3153.17
State Mutual Life Assurance Co. Worcester	27474	Annie D. Upton	3233.37
Fidelity Mutual Life Ins. Co.	202194	Annie D. Upton	6000.00
Connecticut General Life Ins. Co. Hartford	120389	Annie D. Upton	1000.00
			$38877.62

Conceding that the above insurance aggregating $38,877.62 may be included as a part of the gross estate of the decedent, nevertheless, as under Section 402 (f) of the Revenue Act of 1918, the estate is taxable only "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life" no tax under policies taken out by the decedent upon his own life" no tax [illegible] policies of insurance taken out by the de-

the amount of $40,000, representing insurance payable to individual beneficiaries. Of this amount $40,000 was exempt from tax, leaving a balance claimed by the Department to be taxable, and on which tax was paid, in accordance with said Section 402 (f) of said Article 22 of $48,832.96.

On May 27, 1925, the executors of said estate filed a claim for refund of $1931.39, being the amount of estate tax paid on said $48,832.96 at the rate of 4%. Taxpayers based that claim for refund on the decision of the District Court of the United States for the Western District of Pennsylvania in the case of Frick et al. v. Lewellyn, Collector.

To assist the Department in applying to this claim the principals enunciated by the Supreme Court in its opinion (May 11, 1925) deciding the above case, the following supplementary information is given concerning the policies in question.

The following policies which were included as a part of the gross estate of the decedent in the return for Federal estate tax filed by the taxpayers, were taken out by the decedent, and in case of change of beneficiary assigned to designated beneficiaries, before any estate tax act was passed. Under the decision of the Supreme Court the Act did not refer to transactions prior to 1916 and these policies should not have been included or considered at all in the return for Federal Estate tax:

Name of Company	No. of Policy	Date of Issue	Date of last Assignment, if any	Name of Person Receiving Insurance	Full Amount Received
Berkshire Life Ins. Company	38098	June 1, 1891	July 28, 1904	Annie D. Upton	
" "	41714	Oct.11, 1893	" "	Annie D. Upton	
" " "	47984	Dec.24, 1898	" "	Annie D. Upton	$14299.45
" " "	47985	Dec.24, 1898	" "	Annie D. Upton	
Manhattan Life Ins. Company	60061	Oct.9, 1868	----	Annie D. Upton	5000.00
" " "	60062	Oct.9, 1868	-----	George Upton	5000.00
National Life Ins. Co. Montpelier,Vt.	55595	June 15 1892	July 28, 1904	Annie D. Upton	10097.51
Fidelity Mutual Life Ins. Co. Philadelphia,Pa.	209407	Dec. 7, 1909	-----	Annie D. Upton	10000.00
Connecticut Mutual Life Inst Co.	168178	May 22, 1883	-----	Annie D. Upton	5036.37
					$49407.33

Following is a complete list of the policies of insurance taken out by the decedent, and in case of change of beneficiary assigned by him to designated beneficiaries, subsequent to the passage of the estate tax act:

Name of Company	No. of Policy	Name of Person Receiving Insurance	Full Amount Received
Mutual Benefit Life Ins. Co. Newark, N. J.	383891	Annie D. Upton	$5082.63
Berkshire Life Ins. Co. Pittsfield, Mass.	180839	Annie D. Upton	5085.04
Mutual Life Ins. Co. of N. Y.	383891	Annie D. Upton	5015.82
New England Mutual Life Ins. Co.	101312	Annie D. Upton	12387.60
New England Mutual Life Ins. Co.	110070	Annie D. Upton	3183.17
State Mutual Life Assurance Co. Worcester	27474	Annie D. Upton	3233.37
Fidelity Mutual Life Ins. Co.	208194	Annie D. Upton	6000.00
Connecticut General Life Ins. Co. Hartford	126389	Annie D. Upton	1000.00
			$38877.63

Conceding that the above insurance aggregating $38,877.63 may be included as a part of the gross estate of the decedent, nevertheless, as under Section 402 (f) of the Revenue Act of 1918, the estate is taxable only "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life" no tax is due on account of any policies of insurance taken out by the decedent.

Accordingly refund of $1931.39, being the amount of tax paid in reference to insurance taken out on the life of the decedent payable to individual beneficiaries is hereby respectfully requested.

NT-AT-C1-2773-AMB
District of Massachusetts
Estate of King Upton
Date of death - February 27, 1921

George Upton, et al., Executors,
Estate of King Upton,
121 Beverly Street,
Boston, Massachusetts.

Sirs:

Reference is made to the claim dated May 27, 1925, filed June 8, 1925, for refund of $1,931.39 Federal estate tax, alleged to have been erroneously collected from the above-named estate.

The claim is based upon the alleged erroneous inclusion in the gross estate of the amount of certain insurance policies. Certain of the policies were taken out or beneficiaries named subsequent to February 26, 1919, the effective date of the Revenue Act of 1918. As to certain other policies, it affirmatively appears that the decedent reserved incidents of ownership, such as the right to change the beneficiary. As to the remaining policies, it does not clearly appear that the decedent did not reserve incidents of ownership. Accordingly, the Bureau would not be warranted at this time in making any adjustment upon the merits.

The Bureau made its final determination of the liability of this estate and issued the statutory notice of deficiency on May 7, 1925. On March 15, 1926, the estate filed a further claim for refund, based upon the alleged erroneous inclusion in the gross estate of the value of property transferred by the decedent prior to his death. This second claim was rejected and suit instituted to recover the tax alleged to have been erroneously collected, the suit being based entirely upon the second claim. This suit proceeded to judgment and the judgment entered was satisfied. The suit was instituted on July 9, 1926, more than six months after the filing of the claim now under consideration.

At the time of the institution of the suit, the Bureau had made its final determination of the tax liability of this estate. The claim now

under consideration had been pending more than six months, could have been made the basis of an action, and should have been made part of the basis of the action which was brought. It therefore appears that the claim is now barred.

Accordingly, the claim mentioned in the first paragraph hereof is rejected in its entirety.

Respectfully,

Robt. H. Lucas,
Commissioner.

rwb

This cause was thence continued from term to term to the December Term, A. D. 1933, when, to wit, January 10, 1934, the Honorable Elisha H. Brewster, District Judge, sitting, said cause was set down for hearing on the statement of agreed facts and exhibits.

On the said 10th day of January, 1934, requests for findings of fact were filed by the petitioners and requests for rulings filed by the respondent.

Also, on the said tenth day of January, A. D. 1934, the following respondent's motion for judgment was filed:

RESPONDENT'S MOTION FOR JUDGMENT.

[Filed January 10, 1934.]

Now comes the respondent in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the respondent and against the petitioner with costs.

By its Attorneys,
FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

Aug. 7, 1934.
Motion denied,
E. H. B.,
D. J.

This cause was thence continued to the March Term, A. D. 1934, when, to wit, May 11, 1934, petitioners' request for rulings of law was filed by consent.

On the said 11th day of May, A. D. 1934, the following petitioners' motion for judgment was filed by consent:

PETITIONERS' MOTION FOR JUDGMENT.

[Filed by consent May 11, 1934.]

Now comes the petitioners and on the pleadings and evi-

dence move that judgment be entered for the petitioners as prayed for, with interest as provided by law, and costs.

By their Attorneys,

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.

Aug. 7, 1934.

Motion allowed.

E. H. B.,

D. J.

This cause was thence continued to the June Term, A. D. 1934, when, to wit, August 7, 1934, said cause came on for further hearing on the agreed statement of facts, the Honorable Elisha H. Brewster, District Judge as aforesaid, sitting, and it was ordered by the court that the plaintiffs' requests for findings of fact, filed January 10, 1934, be granted, and No. 1 of the respondent's request for rulings be granted and No. 2 request, filed on said January 10, 1934, be denied, defendant's exceptions being saved.

Also on the said 7th day of August, A. D. 1934, it was ordered by the court that the said defendant's motion for judgment be denied, defendant's exceptions being saved.

Also on the same day, an opinion of the court was announced, judgment to be entered for the petitioners.

At the same term, to wit, August 15, 1934, a defendant's bill of exceptions was filed.

Said cause was thence continued to the present September Term, A. D. 1934, when, to wit, October 29, 1934, the defendant's bill of exceptions is allowed by the court.

On the 30th day of October, A. D. 1934, the following petitioners' motion for entry of judgment forthwith is filed:

PETITIONERS' MOTION FOR ENTRY OF JUDGMENT FORTHWITH.

[Filed and Allowed October 30, 1934.]

Now come the petitioners and say that on August 7, 1934,

this Court ruled that the petitioners were entitled to recover in this action in the sum of $1174.79, with interest from February 24, 1922, and the petitioners further represent that the respondent's Bill of Exceptions was allowed on October 29, 1934.

Wherefore, the petitioners move that judgment be entered for them forthwith in the amount of $1174.79, with interest thereon as provided by law from February 24, 1922, and costs.

By their Attorneys,
BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER.

Oct. 30, 1934.
Allowed.
E. H. B.,
D. J.

Thereupon, to wit, October 30, 1934, it is considered on the finding of the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Norman W. Bingham, Jr., Annie D. Upton and George Upton, Executors of the Will of King Upton, petitioners, recover of the said United States of America, defendant, the sum of one thousand one hundred seventy-four dollars and seventy-nine cents ($1174.79), with interest thereon as provided by law from February 24, 1922, and their costs of suit taxed at.....

OPINION.

August 7, 1934.

BREWSTER, J. This action is brought by the executors under the will of King Upton to recover federal estate tax which, it is alleged, was erroneously exacted. The controversy arises over the action of the Commission in including in the gross estate of the decedent, under section 402 (f), seven policies of life insurance.

King Upton died February 27, 1921. During his lifetime he had taken out seventeen policies of insurance on his own life, the proceeds of which aggregated $88,284.96. After deducting the $40,000 exemption, the balance of $48,284.96 was included in the gross estate. It is conceded that the proceeds of ten policies were properly included in the estate. The petitioners contend that seven of these policies, the proceeds of which aggregated $29,369.86 were improperly included. Four of these policies were issued by the Berkshire Life Ins. Co. prior to 1896 and were originally payable to the estate of the insured without power to change the beneficiary or borrow on the policies. On July 25, 1904, the insured assigned to his wife Anna D. Upton, providing she survived, all his right, title and interest in these policies, reserving only the right to apply dividends to reduce premiums. Two of the policies were issued by the Manhattan Life Insurance Company prior to October, 1888. Both were payable to beneficiaries named therein, or their legal representatives, the first to the son and the second to the wife of the insured. One policy was issued by the Connecticut Mutual Life Insurance Company in 1883. This policy was payable to the wife of the insured or her legal representatives. Three of the Massachusetts policies and the Connecticut policy had provisions for paid-up and cash surrender values at stated periods. One of the Massachusetts policies had no such provisions, and the New York policies provided only for non-participating paid-up policies in case of forfeiture for non-payment of premiums.

In the view I take of the case, I deem it unnecessary to set forth in further detail the provisions of the several policies. It is enough to say that in none of them did the decedent have any right to change the beneficiary.

If these policies can be included at all in the taxable estate of a decedent, it must be by virtue of section 402 (f) of the Revenue Act of 1918, which reads as follows:

"Sec. 402. That the value of the gross estate of the

decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

"(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The terms of this subdivision of section 402 are sweeping and embrace within its description the seven policies of life insurance involved in this controversy.

If the Revenue Act of 1918, so far as it sought to include in the gross estate of a testator insurance policies payable to a beneficiary other than the estate, applied to past transactions, the policies involved in this suit might require a consideration of the power of Congress to thus add to the estate of a deceased person, for the purpose of exacting an estate tax. (See *Nichols, Coll.* v. *Coolidge*, 274 U.S. 531. *Sampson* v. *United States*, 1 F. Supp. 95. *Chase National Bank* v. *United States*, 278 U.S. 327.) In *Llewellyn* v. *Frick*, 268 U.S. 238, the Supreme Court has, in no doubtful terms, declared that section 402 (f) of the Revenue Act of 1918 was never intended to apply to transactions taking place before the passage of the Act. Whether that case is authority for excluding from the operation of the Revenue Act all policies of insurance taken out before its enactment, payable to beneficiaries other than the executor, is a question that need not now be answered. The decision held that no one of the policies involved in the Frick case could be properly included in Frick's gross estate, whether it was a fully paid-up policy or otherwise.

The policies with which we are concerned in the case at bar fall within the Frick case. I regard that as controlling. The effect of it was not limited by *Chase National Bank* v. *United*

States, supra. In that case the Court was dealing with policies which had been taken out subsequent to the effective date of the Act imposing the tax.

So far as my conclusions are out of harmony with *Heiner* v. *Grandin,* 44 F. (2d) 141, I can only say that my views accord with those of Judge Buffington who wrote the dissenting opinion. Notwithstanding that certiorari was denied in the *Heiner* v. *Grandin* case, I shall await some clear and definite pronouncement from the Supreme Court before I shall feel at liberty to give the retroactive effect to section 402 (f) for which the government now contends.

I accordingly rule that the seven policies on the life of King Upton, which are now in controversy, should not have been included in the gross estate of the decedent, and that the petitioners are entitled to recover in this action $1174.79 with interest from February 24, 1922.

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed August 15, 1934; Allowed October 29, 1934.]

This is a petition by Norman W. Bingham and others, executors under the will of King Upton, deceased, against the United States to recover Federal estate taxes alleged to have been erroneously and illegally assessed and collected in the amount of $1,931.39, with interest from February 24, 1922. The pleadings are a part of this record and may be referred to as part of this bill of exceptions. The case was tried before Brewster J., on January 10, 1934, on the pleadings, a statement of agreed facts, and Exhibits A, B, C, D, E, and F, being photostat copies of certain applications for life insurance policies (copies of which policies are attached to said statement of agreed facts) with all riders attached thereto and all endorsements thereon. Said exhibits are referred to in paragraph 6 of said statement of agreed facts. The said statement of agreed facts and all of said exhibits are incorporated into and made a part of this bill of exceptions by reference. The foregoing constitutes all the evidence in the case.

At the trial the respondent requested the court to find as a matter of law that the full amount of the proceeds of the seven life insurance policies in question, as set forth in paragraph 6 of said statement of agreed facts, was properly included in the decedent's gross estate under the provisions of Section 402 (f) of the Revenue Act of 1918.

At the trial the respondent filed the following written motion for judgment:

Now comes the respondent in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves that judgment be entered for the respondent and against the petitioners with costs.

At the trial the petitioners filed the following requests for rulings of law:

Now come the Petitioners and request that, as to each of the policies referred to in sub-paragraphs (a), (b), and (e) of the Petition as amended, the Court make the following ruling of law:

That no part of the proceeds of the policy constituted a part of the gross estate of the decedent under the estate tax provisions of the Revenue Act of 1918.

At the trial the petitioners filed the following written motion for judgment:

Now come the Petitioners and on the pleadings and evidence move that judgment be entered for the Petitioners as prayed for, with interest as provided by law, and costs.

The trial was continued generally and on August 7, 1934, during the course thereof, the court denied the respondent's said request for a ruling of law and its said motion for judgment and the respondent saved its exceptions. During the course of the trial the court granted all of the petitioners said requests for rulings of law and their said motion for judgment, and the respondent saved its exceptions. On the same day the court handed down a written opinion in which it held that no portion of the proceeds of the insurance policies in question was properly included in the gross estate

of the decedent under the provisions of Section 402 (f) of the Revenue Act of 1918.

The respondent being aggrieved by the denial by the court of its said request for a ruling of law and its said motion for judgment and in granting the petitioners' said requests for rulings of law and said motion for judgment and by the findings and rulings of the court, now excepts to said findings and rulings of the court, and therefore brings this bill of exceptions and prays that it may be allowed.

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.
By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

Assented to:

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER,
Attorneys for the Petitioners.

Allowed Oct. 29, 1934.

ELISHA H. BREWSTER,
United States District Judge.

STIPULATION AS TO THE RECORD.

[Filed November 5, 1934.]

It is hereby stipulated by the parties hereto that there shall be omitted from the exhibit which is a copy of the application for the Connecticut Mutual Life Insurance Company policy referred to in the Bill of Exceptions the questions and answers numbered 5 to 18 inclusive on said application as they have no bearing upon any of the issues involved.

It is hereby further stipulated by the parties hereto that there shall be omitted from each of the exhibits which are copies of the applications for the Berkshire Life Insurance Company policies referred to in the Bill of Exceptions that

part of each such application which relates to the medical examination as it has no bearing upon any of the issues involved.

NORMAN W. BINGHAM, JR., ET AL.,
Executors under the Will of King Upton.
By their Attorneys,
BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD,
GEORGE S. FULLER.

THE UNITED STATES OF AMERICA,
By FRANCIS J. W. FORD, *United States Attorney.*
By J. DUKE SMITH, *Special Assistant to the United States Attorney.*

Seal 75722
Dagle Et A
1-10-24

APPLICATION FOR INSURANCE UPON THE LIFE OF [illegible] TO BE ISSUED IN THE

BERKSHIRE LIFE INSURANCE COMPANY,

OF PITTSFIELD, MASS.

Questions to be Answered by the Person whose Life is to be Insured, the Answers forming part of the Contract of Insurance.

1. Name of the proposed insured: Thing Hoffer
   Present Occupation: Farmer
   Residence: Salem
   County: Essex
   State: Illinois
   Post Office Address: Salem R.F.D. 289
2. How much insurance do you apply for? $10,000.00
   From what company do you propose to take it? Life Mass
   Has the premium been paid to the date of this application? Yes
3. For whose benefit is this insurance to be effected? Wife
   What relationship to or interest in the life insured? Wife
   Has any Loan thereon been made or any lien created thereon? If so, state the amount thereof, and to whom the same is to be paid. No
4. Place of your birth: Franklin Illinois
   Date of your birth: April 12, 1862
5. Are you married or a widower? Married
6. Have your Grandparents or any of their descendants been afflicted with Insanity, or any Pulmonary or Scrofulous Hereditary Diseases? If so, state particulars: None known to applicant
7. a. Age attained by Grandparents, state whether living or dead? a. Father's Father, Father's Mother, Mother's Father, Mother's Mother.
   b. Age attained by parents, state whether living or dead? b. Father, Mother,
8. a. Is there now any insurance on your life? Ans. Yes
   b. If in this Company, state the No. of Policy and amount. Ans. No. for
   c. If in other Companies, state name of each. Ans. In the John Hancock Co. for $10,000 In the Equitable Co. for $10,000
      Company, and amount insured in each. In the Mutual Life Co. for $10,000 In the Mutual N.Y. Co. for $8000
   d. Has an application ever been made for insurance on your life on which a Policy was not issued, or have you any application now pending? Ans. Yes
   e. Has any Physician given an opinion that you were not safe insurable? Ans. No

I Hereby Declare that the answers to the foregoing questions are true

Witness: Mary E. Jones

Dated at Berlin, Ill., 1924

Date paid July 1, 1924

(Signature of the person proposed for insurance.)

IT IS HEREBY DECLARED AND WARRANTED that all the statements and answers as above made are complete and true and that they are to be the declaration and agreement constituting an application for a policy of insurance and are offered as a consideration and the premium paid, while the person whose life is proposed for insurance is in good health, and the first premium thereon paid, while the person whose life is proposed for insurance is in the same condition of health, described in the answers to the questions in this application, and no contract or insurance shall be a part thereof and the policy shall not take effect unless delivered at all times and places in the state of Illinois

Witness: Mary E. Jones

Date: 1924

Witness: Mary E. Jones

Witness: Lyttell

Agent

Lawn 40920
Dept's Ex B
1-18-39
answ

APPLICATION FOR INSURANCE UPON THE OPTIONAL PLAN

I hereby apply to THE BERKSHIRE LIFE INSURANCE COMPANY of Pittsfield, Mass

FOR A POLICY of $ 5,000. on my life upon the Ord. Pay. Premiums Payable Semi-annually

1.—My full NAME is Irving Applebaum and I BELONG to the White

County of Essex State of Mass My former race was White

2.—My PLACE OF BUSINESS is 111 N. La Salle St Chicago and my P. O. Address is 31 Milk St. Boston Mass.

My present OCCUPATION OR BUSINESS is Manufacturer My other occupations are None

My former occupation have been Same

3.—I have no intention of changing my residence or occupation as stated except Not expected.

4.—I was BORN on the 1st day of April 1894 in Lowell, Mass.

5.—The full name of the person to whom the Insurance is PAYABLE as BENEFICIARY is My wife Ruth

Residing in Same

6. The relationship of the Beneficiary to me is The person insured is

7. I have BEEN INSURED in this company under the number No. 5,000. and AM NOW INSURED FOR $ 5,000. and have also in the following companies: Mass Mutual $5,000. Connecticut Mutual $5,000. Penn Mutual $5,000. Equitable $5,000. Northwestern Mutual $5,000. and have NOW PENDING applications for the following companies: None

8. The following are all the Companies or Associations to which I have ever applied for any Life Insurance which have been REFUSED or to which I am asked for or POSTPONED: None

IT IS HEREBY DECLARED AND WARRANTED that all the foregoing statements and answers are complete and true, and, together with the [illegible] agreement, constitute all the [illegible] and are offered as a consideration for the issuance of a policy of insurance upon the life of the undersigned; and it is agreed that the Company shall not be bound by anything said by any agent or person not herein contained, nor shall any such agent or person have power to make any contract for the Company, or to waive any of its rights or requirements; and if said policy shall be issued, it shall be upon the express condition that the insured is in good health and has not consulted a physician since the date of the medical examination, except as stated therein; and the acceptance of such policy shall be a ratification by the insured of any alteration or correction made by the Company in this application before the delivery of the policy.

It is agreed that in any distribution of surplus the person whose life is insured may be accepted by the Company as a participant in such surplus, and that all the provisions of the policy relating to such participation, shall be and are hereby made a part of this application. If the premium paid with this application be not accepted by the Company, it is agreed that the amount paid shall be returned promptly to the person whose life is insured; and if the policy be issued, the first premium shall be paid after and not before the delivery of the policy, and the policy shall not take effect unless and until the first premium is paid during the lifetime and good health of the person whose life is insured; and if accepted by the Company, it is agreed that the amount paid with this application shall be credited on the first premium, and that the receipt for the first premium shall be given to the insured and not to any agent or other person, and that no agent or other person has authority to make, modify or discharge any contract of insurance, or to extend the time for the payment of any premium, or to bind the Company by making any promise concerning a policy or the death of the insured shall be given to the Company at its office in Pittsfield, Mass.

Dated at Boston Nov 22 1938 Policy to be dated Nov 22 1938

Signed in presence of [illegible] Agent Irving Applebaum

Law 4592
Dft. Ex C
1-10-17

COPY PLICATION FOR INSURANCE UPON THE OPTIONAL PLAN

I hereby apply to THE BERKSHIRE LIFE INSURANCE COMPANY of Pittsfield, Mass.

FOR A POLICY of $ 5000 on my life upon the [illegible] Premiums Payable [illegible]

1.—My full NAME is [illegible] and I RESIDE at [illegible]

County of [illegible] State of [illegible] My former place was [illegible]

2.—My PLACE OF BUSINESS is [illegible] and my P. O. Address is [illegible]

My present OCCUPATION OR BUSINESS is [illegible] My other [illegible]

My former occupations have been [illegible]

3.—I have no intention of changing my residence or occupation above stated except [illegible]

4.—I was BORN on the [illegible] day of [illegible] 1862 in [illegible]

5.—The full name of the person to whom the Insurance is to be payable (BENEFICIARY) is [illegible]

Residing in [illegible]

6.—The relationship of the Beneficiary to me (The person applying for Insurance) is [illegible]

7.—I have BEEN INSURED in this company under [illegible] policies, No. 23091 $ [illegible] No. [illegible] $ [illegible] No. [illegible] $

and AM NOW INSURED FOR $ 4500 — in the following Companies or Associations to wit [illegible]

John Hancock $5000 [illegible] Equitable Life Assurance Society $5000

State [illegible] Mutual Life $5000 [illegible]

and have NOW PENDING applications for insurance in the following Companies: None accepted at Portland 5000 today. Mass Mutual $5000 dated Oct 1842 - 10,000 dated Dec 1842

8.—The following are all the Companies or Associations to which I have ever applied for any Life Insurance which has been REFUSED or on which I am asked for, or POSTPONED: [illegible]

IT IS HEREBY DECLARED AND WARRANTED that all the foregoing statements and answers, as well as the [illegible] application, are complete and true, and together with the [illegible] of insurance and are offered as a consideration for the [illegible] not be binding until said policy shall be issued and [illegible] scribed in the application, and if said policy is issued [illegible] have an interest therein; and the said Declarant [illegible] It is agreed that in any settlement of surplus, [illegible] equitably belonging to such policy, shall be, and [illegible] life is insured may be accepted by the Company in [illegible] of the death of the insured shall be given by the [illegible]

[illegible] Company's Medical Examiner in continuation of this [illegible] COMPANY of Pittsfield, Massachusetts, for a policy [illegible] which is a contract, but which, however, shall [illegible] days for the [illegible] is in the condition of health des[illegible] upon the [illegible] who have, or may after wards [illegible] the [illegible] and [illegible] such [illegible] condition, and [illegible] benefits [illegible] and that the [illegible] of the amount [illegible] and [illegible] and that the person whose [illegible] the assured. It is also agreed that [illegible] and before [illegible] year after the said death.

Dated at Portland Dec 6th 1862 Policy to be dated [illegible] 1862

Signed in presence of [illegible] Agent

Signature of applicant whose life is proposed for insurance [illegible]

Loan 4582
Dept. E.D.

COPY PLICATION FOR INSURANCE UPON THE OPTIONAL PLAN

I hereby apply to THE BERKSHIRE LIFE INSURANCE COMPANY of Pittsfield, Mass. 1-10-94

FOR A POLICY of $ ... on my life upon the ... Plan. 1st Premium Payable ... Ans

1.—My full NAME is ... and I RESIDE in ...

County of ... State of ... My former residence was ...

2.—My PLACE OF BUSINESS is ... and my P. O. Address is ...

My present OCCUPATION OR BUSINESS is ... My other occupations are ...

My former occupations have been ...

3. I have no intention of changing my residence or occupation as above stated except ...

4. I was BORN on the ... day of ... in ...

5.—The full name of the person to whom the Insurance shall be payable, the BENEFICIARY, is ...

Residing in ...

6.—The relationship of the Beneficiary to me (if *not personal for Insurance*) is ...

7. I have BEEN INSURED in this company under the following policies, Viz: ... Still in force $ ... No. ...

and AM NOW INSURED FOR $ ... in the following companies or Societies, to wit: ...

and have NOW PENDING applications for ... in the following Companies: ...

8. The following are all the Companies or Associations with which I have ever applied for any Life Insurance which has been REFUSED or declined or POSTPONED: ...

IT IS HEREBY DECLARED AND WARRANTED that all the foregoing statements and answers, as well as those in the Medical Examination and Agreement, constitute an application to The Berkshire Life Insurance Company of Pittsfield, Mass., for the insurance above applied for, and are offered as a consideration thereof, and shall form the basis of the contract which may be issued hereon, and are to be considered as incorporated in such contract, and it is agreed that no statement or representation not contained in this application shall be binding upon either party, unless herein made or endorsed, and that no agent has authority to make or modify any contract of insurance, or to extend the time of any payment, or to waive any of the Company's rights or requirements. It is agreed that the insurance hereby applied for shall not take effect unless and until the first premium thereon is paid during the lifetime and good health of the person proposed for insurance, and that the receipt to be given therefor shall contain no guarantee or promise other than that the Company will, upon such payment, issue a policy in accordance with the terms of the application, and that the Company shall not be liable for any greater amount than the reserve value of the policy applied for, until the same shall have been delivered to and accepted by the insured while in good health, and the first premium thereon actually paid. It is agreed that the Company shall have the right to decline this application at any time before the delivery of the policy hereby applied for, and that in case of such declination all moneys paid hereon shall be returned to the undersigned. It is agreed that the Company shall not be liable for any greater amount than the reserve value of the policy applied for, until the same shall have been delivered to and accepted by the insured while in good health, and the first premium thereon actually paid. It is agreed that this application and the policy issued hereon shall constitute the entire contract between the parties, and that no agent has authority to alter or modify any of the terms of this contract, or to make any promise or representation not contained herein or endorsed hereon, and that no such promise or representation shall be binding upon the Company

Lease 4092
Deeds G. E. H. I. W.
4-44 10-27
Cancelled

New York, Oct 5 1868

I hereby apply to the **MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK**

for $10,000 *of Insurance on my life.*

PREMIUM *Annually.*
HOW PAYABLE. ~~Semi-annually~~ *Quarterly*

ON WHAT TABLE. *Ordinary Life Non participating*

Life Premiums.

year Endowment.

premiums payable in years.

~~with~~ without *return of premiums.*

Survivorship Dividend Period years.

1. My full name. King Upton

2. Occupation (in full). If a clerk, salesman, or clerk, state definitely in what branch of business. Manufacturer of Glue

3. Residence. City Salem County Essex State Mass

4. Place of Business. If in the employ of any firm, company or business, give exact name of employer. Boston No. 237 St. Franklin

5. P. O. Address. Boston

6. Place of birth Peabody Mass 7. Date of birth April 19th 1862

8. Full name and residence of the person to whom the insurance is to be made payable. Annie D Upton Wife Geo. Upton 3000

9. Relationship of beneficiary to the person whose life is proposed for insurance. Wife and Son

10. The name of every Life Insurance Company to which application to write on my life has been made and the insurance effected, including any Company before which application or information is now pending. John Hancock. Conn Mutual. Home Circle Fallon Mutual

11. The name of every Life Insurance Company in which I am or have been insured, with the amount in each case. John Hancock 1000 Conn Mutual 5000 Home Circle 5000 Union Mutual 5000

12. I have resided in Salem for six years past.

13. If any intention exists of changing residence or occupation, state in what manner. None

14. I am temperate in my habits, and am, to the best of my knowledge and belief, in sound physical and mental condition, have no disease, and am a satisfactory subject for life insurance.

I hereby warrant that the above statements and answers are full, complete and true in every particular, and they are offered as a consideration for the insurance applied for; but it is agreed that there shall be no contract of insurance until a policy shall be issued by the Company, and accepted subject to the stipulations and conditions therein contained.

(Signature of person whose life is proposed for insurance.) King Upton

Witness Nathan Crowell

Loan 45925
Dft; 4 Ft.
Conn-84
Conn

COPY OF APPLICATION FOR INSURANCE IN THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

WHICH IS A PART OF THE CONTRACT OF INSURANCE.

1. Name of the Person whose life is proposed for insurance? WRITE THE NAME IN FULL. King Upton

Present occupation, Farmer — Former occupation, Same — RESIDENCE? Place, Salem; County, Essex; State, Mass

2. a. How much insurance is desired? Ans. $ 5000 — Five Thousand Dollars. b. What form of Policy is desired? Ans. 10 Payt. Life

3. Is it desired to pay the premium in semi annual instalments? (If so paid an addition to the cash payment is required to compensate the Company for the additional labor and expense and the delay in collection of deferred part of premium.) Ans. No

4. a. When and where were you born? Ans. In Peabody, State or Country Mass, On the 17 day of the month of April in the year 18 62 — b. What will be your age at next birthday? Ans. 22 years. Are you married? Ans. Yes

10. To whom is this Insurance payable in case of loss? Annie Upton — Relationship to the Life Insured. wife

11. To whom is it payable in case of Endowment Insurance, if the person insured survives the term, and to whom is the Policy to be surrendered for a cash value as therein provided? Myself

IT IS HEREBY DECLARED AND WARRANTED that the above are in all respects fair and true Answers to the foregoing Questions; and that no evidence respecting any matter inquired of in said Questions, other than those above made, have been made to any Agent, Solicitor, Examiner, or other person, on behalf of the Company; and it is acknowledged and agreed by the undersigned that this Application and Warranty are a part of the consideration for, and shall form a part of, the Contract of Insurance; and that if there be, in any of the Answers herein made, any untruth, evasion, or concealment of Facts, then any Policy granted upon this Application shall be null and void; and all payments made thereon shall be forfeited to the Company. And it is further declared by the undersigned, that the Party making this Application has an insurable interest in the Life above proposed for Insurance to the full amount above applied for. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State, and that the provisions in said policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the issue and forfeiture of policies of life insurance.

Dated at Peabody Mass

this 18th day of May 1883

Witness to the Signing Hereof, S. B. Fay

Signature of the person or persons by whom benefit the Insurance is to be effected. (Write the names in full.) Annie Upton by King Upton

Signature of the person whose Life is proposed for Insurance. (Write the names in full.) King Upton

From the foregoing judgment, the United States of America, defendant, claims an appeal to the United States Circuit Court of Appeals for the First Circuit, on November 5, 1934, said appeal being allowed by the court on the same day.

ASSIGNMENT OF ERRORS.

[Filed November 5, 1934.]

The respondent in this case in connection with its petition for appeal makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

I. That the District Court erred in ruling that the petitioners are entitled to recover.

II. That the District Court erred in refusing to make the following ruling of law requested by the respondent:

> That the full amount of the proceeds of the seven policies in question, as set forth in paragraph 6 of the Statement of Agreed Facts filed herein, was properly included in the decedent's gross estate under the provisions of Section 402 (f) of the Revenue Act of 1918.

III. That the District Court erred in ruling that no portion of the proceeds of any of the insurance policies in question was properly included in the gross estate of the decedent under the provisions of Section 402 (f) of the Revenue Act of 1918.

IV. That the District Court erred in denying the respondent's motion for judgment.

Wherefore, the respondent prays that the judgment be reversed and that the District Court be ordered to enter an order reversing the judgment of the District Court in said cause.

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: J. DUKE SMITH,
Special Assistant to the United States Attorney.

A citation on appeal was issued on November 5, 1934, being made returnable in the U. S. Circuit Court of Appeals on December 5, 1934. Service of said citation was duly acknowledged by the attorney for the petitioners.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

District of Massachusetts, ss.:

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the defendant, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 4592, Law Docket;

NORMAN W. BINGHAM, Jr., et al.,

Executors of the Will of King Upton, Petitioners,

v.

UNITED STATES OF AMERICA,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with the acknowledgment of service of citation on appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this tenth day of December, A. D. 1934.

JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, December 10, 1934, is here omitted. A. I. CHARRON, *Clerk.*]

[fol. 83] In United States Circuit Court of Appeals for the First Circuit, October Term, 1934

No. 2983

United States of America, Defendant, Appellant,

v.

Norman W. Bingham, Jr., et al., Executors, Petitioners, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Wilson and Morton, JJ.

Opinion of the Court—March 26, 1935.

Wilson, J.:

This is an appeal from the judgment of the District Court of Massachusetts in a proceeding to recover a refund of an estate tax assessed under Sec. 402 (f) of the Revenue Act of 1918 and paid by the executors.

The basis of the tax was seven insurance policies, all taken out by the testator prior to 1900 and either assigned to his wife or made payable to his wife or son.

Four policies issued by the Berkshire Life Insurance Company, a Massachusetts company, were originally payable at the death of the testator to his executors, administrators or assigns. In June, 1904, the testator assigned the four policies to the Company as security for a loan of $5,900, which was outstanding at his death on February 27, 1921.

In July, 1904, the testator assigned the four policies, subject to the prior assignment, to his wife, provided she survived him.

[fol. 84] A fifth policy was issued by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, and named the wife of the testator as beneficiary, with a provision that if she did not survive him, it was payable to his children; and if there were no children or descendants thereof living at his death, it was payable to his estate. It was also further provided that at the end of ten years, it

being a ten payment life policy, the insured could himself draw the cash value of the policy, or at the end of each five year period thereafter. The testator did not avail himself of the provision before his death, the last five year period ending May 22, 1918, and the next five year period did not end until 1923, more than two years after his death.

The sixth and seventh policies were issued by the Manhattan Life Insurance Company of New York, one of which was made payable to his wife, and the other to his son. Neither contained a provision for a cash surrender value or the right to change the beneficiary.

The Commissioner of Internal Revenue included in the gross estate of the testator the proceeds of all of the policies above the exemption provided in Sec. 402 (f) of the Act of 1918. His ruling was rejected by the District Court on the authority of Llewellyn v. Frick, 268 U. S. 238, on the ground that the policies were all issued prior to the enactment of the Revenue Acts, and Sec. 402 of the Revenue Act of 1918 was not made retroactive.

An examination of the Frick case, however, leads us to the conclusion that it is not determinative of the present case. While it is claimed that some of the policies in the Frick case, though payable to his wife and children, contained provisions for a change of beneficiaries, these provisions, if they existed, were not referred to by the court in its opinion. The contentions raised in that case were directed more particularly to the constitutionality of Sec. 402 of the 1918 Act on the ground that there was no transfer of property of the testator at death, and that the pro- [fol. 85] ceeds of insurance policies belonged to the wife and daughter, and, therefore, could not be taxed as property passing at the testator's death.

The court said: "that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. (See Sec. 408 of 1918 Act). There would be another if the provisions for the liability of beneficiaries were held to be separable and it is proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer." It avoided a decision of these questions by holding that the statute of 1918 was not retroactive and, therefore, did not apply to policies issued prior to the enactment of the Revenue Acts imposing estate taxes,

adding, as its reason for this interpretation that, "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind."

Since this decision the Supreme Court has more clearly defined what passes at death in the case of trusts and insurance policies, and held that, if the vesting of the property in a donee, grantee or beneficiary is not complete until the death of the grantor, donor, or testator, and there is a complete shifting of the economic interest at death, there is a transfer subject to a tax under the Revenue Acts.

It is "transfers at death," as later interpreted by the Supreme Court in Chase National Bank et al. v. United States, 278 U. S. 327; Reinecke v. Northern Trust Co., 278 U. S. 339; Tyler et al. v. United States, 281 U. S. 497; Klein et al. v. United States, 283 U. S. 231; and Third National Bank & Trust Co. of Springfield et al. v. White, 45 Fed. (2d) 911, affirmed in 287 U. S. 577, that are taxed under the Acts of 1918 and 1921.

While the insurance policies in the case of Chase National Bank et al. v. United States, supra, were issued after the passage of the Act of 1918, the court held that in case of a reservation of a right to change beneficiaries:

[fol. 86] "It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, Cohen v.

Samuels, 245 U. S. 50 (see Burlingham v. Crouse, 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, N. Y. Domestic Relations Law, c. 14, Consol. Laws Sec. 52; Kittel v. Domeyer, 175 N. Y. 205; Guardian Trust Co. v. Straus, 139 App. Div. 884, aff'd 201 N. Y. 546, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

The court in this case, referring to the case of Saltonstall v. Saltonstall, 276 U. S. 260, as supporting its conclusion, said, p. 336, 337:

"But we think that the rule applied in Saltonstall v. Saltonstall, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

[fol. 87] We think this case disposes of the constitutional objection to the provisions of the Acts of 1918 and 1921 raised in the Frick case, and it matters not that the policies were issued prior to the enactment of these Acts, if the testator still retained control of the policies and retained an interest therein which passed by his death to the beneficiary or assignees after these Acts were passed.

This interpretation has been followed in all decisions of the Circuit Courts of Appeals following the decision in the Chase National Bank Case; Heiner v. Grandin, 44 Fed. (2d) 141; Liebes v. Commissioner, 63 Fed. (2d) 870; Levy's Estate v. Commissioner, 65 Fed. (2d) 412; Cook et al. v. Commissioner, 66 Fed. (2d) 995; Scott et al. v. Commissioner, 69 Fed. (2d) 444. In Heiner v. Grandin, there was a minority opinion following the opinion in the Frick case; but the Grandin case was decided before the decision in the

Chase National Bank case. After the decision in the Chase National Bank case, there was a reargument in the Grandin case, and the court in a Per Curiam, 56 Fed. (2d) 1082, affirmed the majority opinion in 44 Fed. (2d) 141. Certiorari was denied, 286 U. S. 561.

We think that under the decisions of the Supreme Court since the Frick case, the four Berkshire policies were taxable. The wife of the testator under these policies received by the assignment of these policies only a contingent interest, unless she survived the testator. Not until his death was her interest therein complete. Therefore, there passed to her at his death an additional interest in the proceeds of the policies which occurred while the Act of 1918 was in effect.

The proceeds of the Connecticut policy must also be held taxable, subject to the limitation contained in Sec. 402 (f) of the 1918 Act. The Supreme Court in the Chase National Bank case also said, p. 337:

"Obviously the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include [fol. 88] the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."

The beneficiary, under this policy did not have an absolute right to the proceeds, since it was dependent on her surviving the insured. In case she did not survive him, it was payable to the insured's children, or, if there were no such children of descendants thereof living at his death, the proceeds were made payable to the legal representative of his estate; and inasmuch as the testator reserved the right to demand its cash surrender value on the day it became a paid-up policy, and at the end of each five year period thereafter, until his death, he had an interest in the policy; and his wife's absolute right to the proceeds was conditioned, not only on her surviving him, but also on his failing to survive each five year period. It was his death before hers which finally terminated his rights under the policy and rendered the rights of the beneficiary absolute

and complete. It is obvious, we think, that the wife's rights under the policy were enlarged by his death.

In the Manhattan policies no right of cash surrender or to change the beneficiaries was provided. The insured had no interest in these policies that could be terminated at his death. His failure to pay the premiums might terminate the interest of the beneficiary, but it would terminate no interest that could possibly revert to or benefit him. Therefore, no estate tax should have been assessed on the Manhattan policies.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

OPINION (Dissenting in Part)

BINGHAM, J. (dissenting in part).

This case presents the question whether the Commissioner of Internal Revenue was authorized to include the proceeds of seven policies on the life of the testator, King Upton, in his gross estate and impose thereon a tax under Section 402 (f) of the Revenue Act of 1918. Four of these policies were assigned to his wife, provided she [fol. 89] survived him. In two other policies his wife was the beneficiary in one and his son in the other. The remaining policy named the wife as beneficiary and provided that, if she did not survive him, it was payable to his children. This policy (the Connecticut one) contained a further provision giving the testator a recurrent power, the terms of which are hereafter given in full.

The testator died February 27, 1921, without having exercised the power at any recurrent period.

All of these policies are in excess of the $40,000 exemption on policies payable to beneficiaries other than to the estate of the decedent, provided for in Section 402(f) of the Act of 1918, and the main question in determining the right to include the avails of the Connecticut policy in the gross estate and subject them to taxation is whether, at the time of the testator's death, he had an interest in the policy which passed to the beneficiary or a power which he could have exercised at the time of his death.

As to the first four policies (those of the Berkshire Life Insurance Company) and the other two (those of the Man-

hattan Life Insurance Company) I am in entire accord with the conclusion reached as to each in the opinion of the court, but as to the remaining one (the Connecticut policy), it does not seem to me that the testator, at the time of his death, had any interest in that policy which passed to the beneficiary or any power which he could then exercise for the benefit of his estate, and that, unless he had a power over the proceeds of this policy which he could then exercise, the Commissioner erred in including its avails in the decedent's gross estate, for otherwise every interest in the policy vested in the beneficiary when it was taken out. Chase National Bank v. United States, 278 U. S. 327, 334.

The policy in question was for the sum of five thousand dollars, and was payable to Annie Upton, the wife of the insured. It contained a cash surrender clause which might [fol. 90] be exercised under certain conditions by the insured after the expiration of ten years from the date of the policy (May 22, 1883), and at the end of each five year period thereafter, reading as follows:

"And at the end of ten years from the date hereof, or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay a Cash Value therefor, to be ascertained by the Table of Cash Values endorsed hereon and hereby made a part of this Contract; such Cash Value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to, and this Policy to be first released and discharged to the satisfaction of said Company by King Upton, the Insured;"

The policy having been taken out May 22, 1883, the end of the ten-year period was May 22, 1893, and the end of the last five-year period that ocurred before his death and when the testator could have exercised the power, was May 22, 1918, at which time he had thirty days in which to do so. He did not exercise the power on May 22, 1918, or within thirty days thereafter, or at the end of any prior period; and from May 22, 1918, down to the time of his death, February 27, 1921, he had no power which he could have exercised over the avails of the policy for the benefit of his estate or for anyone else. It therefore cannot be said that, at the time of his death, he had a power over the cash value of

this policy which he then could have exercised and that, by his failure to do so, an interest passed to his wife. Had he lived until May 22, 1923, he would have acquired a power which he could then have exercised, but he did not live to that time and had no such power at the time of his death.

It is fairly certain that the decision in Chase National Bank v. United States, supra, is not controlling here, for in that case the decedent had a power which he could have exercised at the time of his death for the benefit of his estate, and his failure to do so transferred an interest to the beneficiary. Not so here.

[fol. 91] Neither does it seem to me that the decision in Tyler v. United States, 281 U. S. 497, is controlling here. There the relevant provisions of the taxing statute were Sections 202 and 202 (c). In 202 (c) Congress manifested an intention to tax the interest of a deceased tenant by the entirety by specifically providing that the interest of a tenant by the entirety, except such part thereof as might be shown to have originally belonged to some other person and never to have belonged to the decedent, should be included in his gross estate; and the only question was whether Congress had the power to impose such a tax, inasmuch as, at common law, no interest in property held by husband and wife by the entirety passed at the death of either to the survivor. But Congress having specifically provided that such an estate should be included for taxation in the gross estate of a decedent, if created by him out of his estate, and it appearing that the estate by the entirety was created out of the decedent's estate, and, as a matter of fact, though not as a matter of law, the estate of the wife was enlarged by the death of the husband, and "because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; * * * and became entitled to hold and enjoy it absolutely as her own; and * * * of disposing of the property by an exercise of her sole will," the court, in that case, was of the opinion that Congress had the power, under the Constitution, to tax such an interest. There the decedent, down to the time of his death, had an interest in the entirety which he could enjoy, including all the income. Cooley v. Commissioner 74 Fed. (2d) decided January 31, 1935. But here the decedent had no interest in the policy or power of control over it which he could exercise at the time of death. The wife's title to the proceeds of the policy was

complete before his death. He could not at the time of death defeat it and his death did not perfect her title or enlarge her estate. The situation existing at the time of his death is or should be controlling, not what it might be at some other time.

[fols. 92 & 93] On January 9, 1935, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twenty-sixth day of March, A. D. 1935, the opinion of the court (page 83) and a dissenting opinion by Bingham, J. (page 88), were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—March 26, 1935

This cause came on to be heard January 9, 1935, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 26, 1935, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

RECITAL AS TO ORDER STAYING MANDATE

Thereafter, to wit, on April 27, 1935, mandate was stayed until further order of court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 94] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted, and the case is assigned for argument immediately following No. 25.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,636. U. S. Circuit Court of Appeals, First Circuit. Term No. 83. Norman W. Bingham, Jr., et al., etc., Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 29, 1935. File No. 83 O. T. 1935.